

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KEVIN MCCLINTIC,

Plaintiff,

v.

LITHIA MOTORS, INC.,

Defendant.

CASE NO. C11-859RAJ

ORDER

I. INTRODUCTION

This matter comes before the court a second time on Plaintiff Kevin McClintic's motion (Dkt. # 19) for preliminary approval of a class action settlement. On October 19, 2011, the court issued an order (Dkt. # 31) making some findings and conclusions relevant to preliminary approval, but requiring additional submissions from the parties before resolving the remaining issues. On November 2, 2011, the parties filed a joint statement in response to the order. Dkt. # 32. After consideration of the joint statement and the balance of the record, the court DENIES the motion for preliminary approval for the reasons stated below. The parties may renew the motion in compliance with this order no later than February 17, 2012.

II. BACKGROUND

Defendant Lithia Motors, Inc. ("Lithia") operates a chain of car dealerships in the West and Midwest. In April 2011, it began a marketing campaign wherein it sent nearly

1 58,000¹ people an identical text message promoting a Lithia sale. About 4,000 of those
2 people were residents of the State of Washington, including Mr. McClintic, a King
3 County resident. Lithia extracted the telephone numbers from various forms that its
4 customers filled out when they bought vehicles. Most of the forms in the record contain
5 an area for a customer to add his or her “preferred contact phone numbers,” although
6 nothing in the forms explains for what purposes Lithia will use those numbers. Dkt. # 32,
7 Exs. A-B. Lithia characterizes its customers’ provision of telephone numbers as
8 “voluntary,” although the forms themselves do not suggest an option for a customer to
9 decline to provide a phone number. One form, which Lithia used in some Toyota sales,
10 expressly discloses that Lithia may use phone numbers for marketing by text message,
11 and asks for the customer’s consent to do so. Dkt. # 32, Ex. C.

12 DMEautomotive, LLC (“DME”), assisted Lithia in carrying out its text message
13 marketing campaign. Because it is not clear what aspects of that campaign DME
14 executed, conduct that the court attributes to Lithia throughout this order may well be
15 DME’s conduct in whole or in part.

16 After sending the first batch of 58,000 messages, Lithia apparently reviewed its
17 list of telephone numbers and determined that about 10,000 of them were on a national
18 “do not call” list. Lithia removed those numbers from the list before sending a second
19 batch of identical messages shortly after the first. In the time between the first batch and
20 the second batch, about 6,000 recipients of Lithia’s text messages sent a reply message
21 requesting that Lithia send them no more messages. Lithia apparently did not honor
22 those requests.

23 Lithia ended its text message campaign after it sent the second batch of messages.

24 Mr. McClintic sued Lithia in King County Superior Court in April 2011, perhaps
25 even before Lithia sent its second batch of text messages. He asserted three Washington

26
27 ¹ The court uses round numbers throughout this order.

1 law claims: one for violation of the law restricting the use of automatic dialing and
2 announcing devices, RCW § 80.36.400; one for violation of the law restricting
3 unsolicited commercial text messages, RCW § 19.190.060; and one for violation of the
4 Washington Consumer Protection Act, RCW Ch. 19.86. He also alleged a violation of
5 the automated dialing restrictions of the federal Telephone Consumer Protection Act
6 (“TCPA”), 47 U.S.C. § 227(b). He hoped to pursue the TCPA claim on behalf of a class
7 of all recipients of Lithia’s text messages, and to pursue the Washington claims on behalf
8 of a subclass of Washington recipients. Lithia timely removed the case to this court in
9 May 2011.

10 The parties immediately began to discuss settlement. They mediated the dispute
11 on July 5, 2011, and reached a settlement. They proposed certifying a settlement class
12 defined as follows:

13 All persons within the United States who received a Text Message on their
14 cellular telephones from Defendant or on Defendant’s behalf, at any time
15 during the Class Period, including all persons within the United States who
16 received a second Text Message from Defendant or on Defendant’s behalf
17 after attempting to opt out after receiving a first Text Message.

18 Lithia agreed to make direct payments to class members totaling \$1.74 million. Class
19 members would lay claim to the settlement fund by returning a postcard-sized form
20 indicating into which of three categories they fell: (1) those who received one message
21 only; (2) those who sent a message attempting to stop Lithia from sending additional
22 messages after the first, but nonetheless received a second message; and (3) those who
23 received a second message without a previous attempt to stop it. Claimants in the first
24 category would receive \$175. Claimants in the second category would receive \$675.
25 Claimants in the third category would receive \$350. In the event that class members
26 failed to claim the entire \$1.74 million fund, the balance would revert to the Legal
27 Foundation of Washington as a *cy pres* recipient. If class members claimed more than
28 the \$1.74 million fund, Lithia would reduce all payments pro rata. Assuming equal

1 participation rates among the three categories of claimants, Lithia must reduce payments
2 pro rata if more than 8.5% of class members make claims. Lithia agreed to pay Mr.
3 McClintic's attorneys ("class counsel") up to \$600,000 in fees and expenses, subject to
4 court approval. It also agreed to pay Mr. McClintic an incentive award of up to \$10,000,
5 again subject to court approval. Lithia also promised to pay the costs of administering
6 the settlement, up to \$150,000. All told, Lithia agreed to pay up to \$2.5 million in the
7 settlement. In exchange, class members would release claims against both Lithia and
8 DME arising from the text messages.

9 The settlement also includes Lithia's agreement to the entry of an injunction. The
10 settlement agreement describes it as follows:

11 Defendant shall stipulate to the entry of an injunction that enjoins
12 Defendant from violating the TCPA, 47 U.S.C. § 227, and/or RCW
13 19.190.060 through the unlawful use of an automatic dealing and
14 announcing device ("ADAD") to deliver text messages for commercial
15 solicitation to Class Members who have not provided express consent.
Such injunction shall be null and void in the event of, or to the extent that,
governing law as it now exists or may exist in the future would allow such
activity.

16 Settlement Agreement, ¶ III.C.1. The court will discuss this injunction in its later
17 analysis. For now it suffices to observe that the injunction would prohibit no specific
18 conduct, it merely obligates Lithia to follow the law.

19 The parties first submitted a motion for preliminary approval of their settlement in
20 August 2011. In its October 2011 order, the court found on a preliminary basis that the
21 proposed settlement class satisfied the four prerequisites of part (a) of Federal Rule of
22 Civil Procedure 23 ("Rule 23"). The court found that the proposed class satisfied the
23 "superiority" requirement of Rule 23(b)(3), but required additional information before it
24 could determine if it satisfied the requirement that common issues of fact and law
25 predominated over individualized questions. The court also required additional
26 information to assess whether the proposed settlement was "fair, reasonable, and
27 adequate." Fed. R. Civ. P. 23(e)(2).

1 The parties' joint statement addressed many of the concerns the court raised in its
2 prior order. The court now considers their preliminary approval motion a second time.

3 III. ANALYSIS

4 For reasons the court will now explain, the court finds that the proposed class
5 settlement satisfies the requirements of both Rule 23(a) and Rule 23(b)(3). It also finds
6 that while the settlement advances substantially toward a resolution that is fair,
7 reasonable, and adequate, several obstacles prevent the court from granting preliminary
8 approval. Because it appears to the court that the parties can, if they choose, remove
9 those obstacles, the court will permit them to renew their motion for preliminary approval
10 at their option.

11 The parties' agreement to settle this matter is not a sufficient basis for approving
12 the settlement. The settlement would require the court to certify a class and dispose of
13 the claims of its members. The court has an independent obligation to protect class
14 members. *Silber v. Mabon*, 957 F.2d 697, 701 (9th Cir. 1992). Even for a class certified
15 solely for settlement, the court must ensure that the class and its proposed representatives
16 meet the requirements of Federal Rule of Civil Procedure 23 ("Rule 23"). *Staton v.*
17 *Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). In addition, the court must ensure that the
18 settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). The court has
19 already made several findings relevant to preliminary approval in its October 2011 order.
20 It will not repeat those findings, except where necessary to give context.

21 The parties' most recent submission convinces the court that common issues of
22 fact and law will predominate in this action. Lithia's test message campaign consisted of
23 only two "batches," the first a set of identical text messages to about 58,000 people, and
24 the second a set of identical text messages to about 48,000 people. Each message
25 targeted a Lithia customer who had provided Lithia with contact information, including a
26 telephone number, in conjunction with a prior vehicle purchase. The forms on which

1 customers provided that information were not identical. This matters because one of the
2 critical issues the parties would have litigated is whether customers consented to receive
3 Lithia's text messages. In some cases, it appears they did so explicitly. In other cases,
4 their written consent is questionable at best. Moreover, Lithia claims that some
5 customers gave consent verbally in conversations with its employees. These issues of
6 consent would be the primary individualized issues at a trial. The court finds, however,
7 that common questions arising from Lithia's marketing campaign predominate.

8 The parties have also alleviated the court's primary concern about the adequacy of
9 the benefits the settlement makes to class members. In its prior order, the court explained
10 its conclusion that the upper limits of the payments to each of the three categories of class
11 member claimants were, on their face, adequate compensation given the nature of Mr.
12 McClintic's claims. But, if more than 8.5% of class members were to participate in the
13 settlement, Lithia would reduce all payments pro rata so that it paid no more than \$1.74
14 million directly to class members. If, for example, *every* class member made a valid
15 claim on the settlement, each would receive payments of only 8.5% of the sums the
16 parties tout in the settlement agreement. In that case a person with a valid claim for a
17 single text message would receive \$14.87 rather than \$175. In the court's experience, the
18 simple act of requiring class members to submit a claim form insures that most of them
19 will not do so. As the court pointed out in its prior order, an 8.5% participation rate is
20 well within the range of what the court would expect. The court's concern, however, was
21 that it saw no reason to require class members to submit a claim form, because Lithia's
22 records seemed to already identify the class members who received each of its text
23 messages as well as who had attempted to stop Lithia from sending a second message. A
24 claim form is superfluous where Lithia already knows who has valid claims.

25 The parties now explain that while they can identify to whom Lithia *sent* text
26 messages without the aid of a claim form, they cannot verify who *received* those text
27

1 messages absent a claim form. Although Lithia acknowledges that it is likely that most
2 of the customers received the messages it sent,² there are many reasons that some
3 messages would not have reached their intended recipients. Customers may have later
4 abandoned the phone numbers they provided, provided inaccurate numbers, or provided
5 numbers that could not receive text messages. Because Mr. McClintic's claims depend
6 on proof of receipt of a text message, the court finds it reasonable to require class
7 members to submit a claim form. That requirement, in turn, is likely to ensure that class
8 members who make claims receive adequate payments.³

9 The court concludes that the injunction to which Lithia has agreed is valueless.
10 The injunction does not prohibit any specified practice. It does not, for example, require
11 Lithia to stop sending text messages to class members or require Lithia to obtain new and
12 unambiguous consent before sending more messages. The injunction merely requires
13 Lithia to follow the law with respect to text message solicitations. At substantial risk of
14 stating the obvious, the court observes that Lithia is already required to follow the law.
15 The parties have made no showing that the injunction would provide a benefit to class
16 members. If the parties continue to pursue settlement, they may wish to remove this
17 injunction as a mandatory component of their agreement. The court is unlikely to enter a
18 meaningless injunction.

19 With these concerns addressed, the court concludes that the framework of the
20 parties' agreement describes a class settlement that the court could preliminarily approve.
21 There are several details, however, that prevent the court from giving preliminary
22 approval at this time. The court now lists them.

24 ² Indeed, Lithia can be certain that at least 6,000 people received its first text message, because
25 they sent reply text messages in an attempt to stop Lithia from sending another message.

26 ³ The court's prior order considered the proposed \$175, \$350, and \$675 payments in light of the
27 Washington and federal claims each class member could assert. The court concluded the
28 payments were adequate. The court does not repeat its discussion here.

1 First, the settlement unnecessarily provides for the distribution of settlement
2 proceeds to the Legal Foundation of Washington (“LFW”) as a *cy pres* recipient. If
3 relatively few class members participate in the settlement, such that their payments do not
4 exhaust the \$1.74 million, Lithia will distribute the remainder to LFW. The parties do
5 not explain this choice. The settlement provides for a pro rata decrease to each class
6 member’s payment if too many of them participate; it could just as easily provide for a
7 pro rata *increase* to each class member’s payment if too few of them participate. *Cy pres*
8 payments are important where practical considerations prevent the distribution of funds
9 directly to class members. See *Naschin v. AOL, LLC*, No. 10-55129, 2011 U.S. App.
10 LEXIS 23244, at *8 (9th Cir. Nov. 21, 2011). In this case, the only impediment to full
11 distribution of the \$1.74 million to class members is the artificial payment cap the parties
12 have imposed. See *id.* at *11 (noting court’s obligation to consider interests of class
13 members when considering *cy pres* proposal). The parties do not explain why they wish
14 to cap relief to class members in favor of *cy pres* relief. In a case like this one, *cy pres*
15 payments ought to be limited to a distribution of money that the parties cannot distribute
16 to class members with reasonable efforts. That would include, for example, settlement
17 checks that are returned or that class members do not cash within a reasonable time.

18 Second, the settlement agreement ensures that class members will receive no
19 direct benefit from the amounts Lithia has agreed to pay class counsel, for settlement
20 administration costs, and for Mr. McClintic’s incentive award. Lithia has agreed to pay
21 up to \$2.5 million in this settlement, but the parties have agreed in advance that Lithia
22 will pay no more than \$1.74 million directly to class members. The rest will go to class
23 counsel (up to \$600,000), to settlement administration (up to \$150,000), and to Mr.
24 McClintic (up to \$10,000). If the court enters smaller attorney fee and incentive awards,
25 or settlement administration costs are lower than \$150,000, the remainder of this money
26 will remain in Lithia’s hands. The Ninth Circuit has recently emphasized that such

1 agreements are inherently suspect. *In re Bluetooth Headset Prods. Liability Litig.*, 654
2 F.3d 935, 949 (9th Cir. 2011).

3 Third, class members who do not opt out of the settlement must release claims not
4 only against Lithia, but against DME. DME is not a named party in this litigation, which
5 is not itself an impediment to the proposed release. In their recent joint statement,
6 however, the parties reveal that DME will make an unspecified financial contribution to
7 the settlement fund. The settlement agreement makes no mention of DME's contribution.
8 Rule 23(e)(3) requires parties to disclose all agreements they make in connection with a
9 settlement proposal. They have not complied with the rule with respect to whatever
10 agreement they reached with DME. DME need not admit fault, but the parties must
11 disclose its contribution to the settlement.

12 Fourth, the settlement agreement includes a provision for a website to assist in
13 informing class members about the settlement and other events in this litigation. For
14 reasons the parties do not explain, however, they propose to keep the website active for
15 only sixty days. Settlement Agreement ¶ III.C.6(c). This artificial limit does not serve
16 the interests of class members.

17 Fifth, as the court noted in its prior order, the release of claims that the parties
18 propose to bind class members is virtually incomprehensible. The court will not approve
19 any settlement unless it is reasonably likely that a class member without the assistance of
20 an attorney can comprehend what he or she is releasing.⁴

21 Sixth, by mailing class members a postage-prepaid claim form, the parties will
22 make it easy for class members to submit claims. The parties do not make it as easy for
23 class members to opt out of the settlement. To opt out, one must print a form from the
24 settlement website and mail it at his or her own expense to the settlement administrator.
25 It would be simple, for example, to add the option to opt out to the same postage-prepaid

26 ⁴ The parties agreed in their joint statement to remove a superfluous acknowledgement of the
27 release from their proposed claim form.

1 card containing the claim form. The parties make it even harder to object to the
2 settlement. They propose to require objectors to pay to mail their objections to class
3 counsel, Lithia's counsel, and the court. There is no obvious reason that the parties could
4 not designate a single recipient for objections, and then distribute the objections to the
5 parties and the court after the objection deadline. One hallmark of a reasonable
6 settlement agreement is that it makes participation as easy as possible, whether class
7 members wish to make a claim, opt out, or object.

8 Seventh, for class members who wish to object, the parties impose a host of
9 restrictions on the content of the objection, including a statement that an "objection will
10 not be valid if it only objects to the Lawsuit's appropriateness or merits." Settlement
11 Agreement ¶ 10. The court will be the sole judge of the validity of an objection. Again,
12 a hallmark of a reasonable settlement is one that encourages participation by making all
13 forms of participation reasonably accessible to class members.

14 Except where noted, none of the concerns that the court has listed, standing alone,
15 is fatal to the settlement. Collectively, however, they lead the court to conclude that the
16 settlement is not appropriate for preliminary approval. If the parties wish to modify their
17 settlement to address those concerns, they may submit a renewed motion for preliminary
18 approval no later than February 17, 2012. If the parties choose this option, they need not
19 repeat arguments from their prior submissions or duplicate evidence that is already part
20 of the record. They need only explain to the court how they have chosen to address the
21 concerns identified in this order. They also need not revise the proposed forms of notice
22 they have submitted, as the court will perform the initial revision if it grants preliminary
23 approval. If the parties do not submit a renewed motion, the court will set a case
24 management schedule, including a trial date and a deadline for a class certification
25 motion.

IV. CONCLUSION

For the reasons stated above, the court DENIES the parties' motion for preliminary approval. Dkt. # 19. The parties may renew their motion in accordance with this order no later than February 17, 2012.

DATED this 12th day of January, 2012.

A handwritten signature in black ink, reading "Richard A. Jones", written over a horizontal line.

The Honorable Richard A. Jones
United States District Court Judge